In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1268

THE POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORPORATION,
COLUMBIA PICTURES CORP.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LIST OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO.

THE POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORP., COLUMBIA PICTURES CORP.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner herein, The Poster Exchange, Inc., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on November 11, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 542 F.2d 255, and is reproduced at Appendix A, infra. p. 1a. The Judgment of the Court of Appeals is reproduced at Appendix B, infra. p. A-5. The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, is not reported; it is reproduced at Appendix C, infra. p. A-7.

JURISDICTION

The judgment of the Court of Appeals was entered on November 11, 1976, and petitioner's timely petition for a rehearing (Appendix D, infra.p.A-11) was denied on December 13, 1976, (Appendix E, infra.p.A-16). This petition for certiorari is being filed less than 90 days from the date last abovementioned. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the effect of the decision below is to undermine effective enforcement of the federal antitrust laws by conferring on a convicted monopolist (National Screen Service Corp.) a partial immunity from liability for future violations.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (15 U.S.C. 731 and 737 (15 U.S.C. Sections 15 and 16) are reproduced at Appendix F, infra. p. A-17.

STATEMENT OF THE CASE

This is an action by Petitioner for treble damages and injunctive relief for alleged violation of sections 1 and 2 of the Sherman Antitrust Act. The action was commenced in the United States District Court for the Northern District of Georgia, Atlanta Division, under sections 4 and 16 of the Clayton Act, upon which jurisdiction of the said District Court is based (see Appendix F, infra. p. A-17.)

The Facts

The operative facts in this case are substantially the same as the facts stated in the opinion delivered by this Court in the case of *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955). They may be briefly summarized as follows.

Petitioner is a jobber engaged in the business of servicing motion picture theatre operators ("exhibitors") with supplies of advertising posters, known in the trade as "standard accessories."

Petitioner is a localized jobber doing business only in the motion picture district of Atlanta, Georgia.

One of the Respondents, National Screen Service Corporation ("National Screen") is engaged in the same business as petitioner, but on a national scale, and therefore it competes with Petitioner in the area of Atlanta, Georgia.

Standard accessories embody copyrighted matter from the pictures being advertised, and therefore they may be said to be a very special kind of poster; they are produced by the motion picture companies ("Producers") who produce the motion pictures being advertised.

Prior to the year 1941 Petitioner was able to obtain supplies of standard accessories by buying them from the Producers. During the 1940's, however, all of the major Producers entered into an expressly exclusive license agreement with National Screen with the intent, and with the result, of making it impossible for any poster distributor

other than National Screen to obtain any supplies of standard accessories from any source within the United States.

These agreements required National Screen to pay a substantial share of its profits to the Producers.

In 1943 National Screen, in order to avoid litigation, agreed to sell supplies of standard accessories to Petitioner, but on May 16, 1961, National Screen discontinued this practice and this litigation resulted.

History of the Case

This suit (Civil Action 12497) is the second suit commenced by this petitioner primarily on the basis of the aforesaid exclusive license agreements.

Suit No. 1
(Civil Action 7665)

The first suit (Civil Action 7665) was commenced on July 17, 1961.

Originally National Screen was the only defendant named in that suit.

Subsequently, the complaint was amended so as to include five of the major film companies ("Producers") as parties defendant. The Producers thus joined were all of the six Producer Respondents named herein, except Columbia Pictures Corp. ("Columbia".)

Promptly thereafter, the Producers (but not National Screen) filed a motion for summary judgment.

This motion was based on the supposed *stare decisis* effect of a case decided in a different Circuit, and involving a different plaintiff, named Lawlor.

On July 2, 1963, the court granted the motion for summary judgment.

The opinion of the court is reported at 35 F. R. D. 558.

On Appeal, the judgment was affirmed per curiam, and this Court denied certiorari: *Poster Exchange, Inc. v. Paramount Film Dist. Corp.*, 340 F.2d 320 (1965) cert. den. 381 U.S. 936.

Subsequently National Screen also moved for summary judgment on the same ground, and the district court granted the motion, and entered the judgment; but on appeal the judgment was reversed and the case was remanded for trial on the merits: *Poster Exchange, Inc. v. National Screen Service Corp.* 363 F.2d 571 (1966) cert. den. 385 U.S. 948.

Consequently, the case proceeded to trial against National Screen alone. The trial was to the court without a jury and resulted in the entry of a money judgment against National Screen in the amount of $150,000, trebled to $450,000.

On appeal, the judgment was affirmed: *Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334 (1970), cert. den., 401 U.S. 912; Rehearing Den. 401 U.S. 1015.

Suit No. 2

(The Instant Suit)

(Civil Action 12497)

The instant suit was commenced on February 26, 1969, promptly after the entry of the aforesaid money judgment against National Screen.

In the complaint filed in this suit, the plaintiff claimed damages for losses of income suffered as a result of restraints imposed during the four year period prior to commencement of the suit.

Named as defendants were National Screen and the six Producers named as respondents in this proceeding including Columbia - which, as aforesaid, was not named as a party in suit No. 1. (Civil Action 7665, *supra.*)

The first thing that happened in this case was that the district court dismissed it as to the Producers by entering summary judgment for them on the ground of the statute of limitations, but on appeal this judgment was reversed with a remand: *Poster Exchange, Inc. v. National Screen Service Corp.*, 456 F. 2d 662 (1972).

After remand, the district court again dismissed the suit, on the grounds of collateral estoppel and the statute of limitations.

This time around, the suit was dismissed as to all defendants - the seven Producer defendants' and National Screen.

On appeal, the judgments of dismissal were affirmed except with respect to one Producer (Columbia)[1] and National Screen.[2]

With respect to those two defendants, the judgments were vacated with another remand.

But the court of appeals held that plaintiff (petitioner, herein) would not recover unless it could prove that during the four-year damage period involved in the suit (February 26, 1965 to February 26, 1961) it (the plaintiff) made demand on National Screen to provide supplies of posters and that the demand was refused.

In an effort to comply with that requirement, petitioner showed the following.

(1)

Plaintiff filed an affidavit signed by William D. Gearing, a former employee.

This affidavit is short and concise, and is therefore quoted below in full.

"I, WILLIAM D. GEARING, being duly sworn, depose and say that:

"1. The Manager of the Poster Exchange, Inc.'s office in Atlanta, until May 8, 1967, was Mr. M.J. Rogers. Mr. Rogers died suddenly on or about that date and I became

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1. *Poster Exchange, Inc., v. National Screen Service Corp.*, 517 F. 2d 117.

2. *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 129.

Manager of that office, and served as its Manager, during portions of the years 1967 and 1968.

"2. During the period I was Manager, on several occasions, I requested the salesmen in the Atlanta office of National Screen Service Corporation to sell to me, for the use of The Poster Exchange, Inc., supplies of standard accessories; that all of these requests were denied and refused.

"Atlanta, Georgia, this 27th day of February, 1976."

(2)

Plaintiff filed an affidavit signed by William H. Cobb, plaintiff's general manager, in which it was alleged, in part, as follows:

"21. Except for a short period of time when a preliminary injunction was in effect (during a part of the years 1962 and 1963) National Screen repeatedly and consistently refused to sell any supplies of standard accessories to the plaintiff during the period beginning May 16, 1961, and ending October 29, 1970.

"22. During the period of May 16, 1961 to October 29, 1970, and particularly during the years 1965 to 1969, plaintiff's employee and agent repeatedly requested National Screen's employees and agents to sell plaintiff supplies of standard accessories, but National Screen's employees and agents refused and denied all of such requests.

"23. During the years 1965 through 1969 National

Screen's employees and agents, who were in charge of National Screen's branch office in the City of Atlanta, Georgia, were under instructions from National Screen's general manager not to sell any supplies of standard accessories to plaintiff."

The court below shrugged of this evidence by simply stating in a PER CURIAM opinion, that:-

"As before, Poster's response was to present affidavits lacking the requisite evidentiary value (citing cases). Consequently, we find no basis for error in the District Court's granting summary judgment against Poster."

(3)

Plaintiff filed a petition for a rehearing (Appendix D. infra. p. A-11), which is less than two pages long, and since petitioner is anxious for this Court to read this petition, it is quoted below in full:

"MAY IT PLEASE THE COURT:

"It is respectfully submitted that in view of all the facts and circumstances the plaintiff should be permitted to present oral argument in this case.

"Up to this time neither the court below nor this Court has heard any oral argument.

"The question presented is whether plaintiff has any substantial proof that National Screen Service Corporation ("National Screen") refused to sell supplies of advertising accessories to plaintiff during the years 1965-1969.

"Plaintiff respectfully submits that the three points contained in plaintiff's supplemental brief are of sufficient substance to entitle the plaintiff to be heard in oral argument.

"These three points may be briefly summarized as follows:

I

"In the Complaint filed in this case (on February 26, 1969) plaintiff alleged 7/23(c)) as follows:

> "'(c) Since May 16, 1961, National Screen Service Corporation has refused absolutely to deal with plaintiff in either standard or specialty accessories.'
>
> "And National Screen's answer (see 7/8) constitutes a legal admission that this allegation is true and correct (see page 2 of Plaintiff's Supplemental Brief).
>
> "It should also be noted that the facts stated in Plaintiff's Supplemental Brief have not been challenged in any way.

II

"At a hearing before Judge Morgan, on November 23, 1971, Mr. Charles H. Kirbo, attorney for National Screen, in open court, made a rather extensive chronological statement (see pages 3-6 of Plaintiff's Supplemental Brief) at the end of which he said:

> " 'Mr. Kirbo: At that time we were actually refusing to sell them. Since then . . . we offered to sell them and they agreed to buy . . . and are still buying from us.'

"When Mr. Kirbo's full statement is taken into consideration, it becomes plain that what he meant to say was that the period of time when National Screen was 'refusing to sell' included part of the years 1965 to 1969.

"Neither Mr. Kirbo nor National Screen has denied this.

III

"In an opinion filed on April 15, 1974, the court below (per Hon. Albert J. Henderson, Jr.) in part said:

> " '. . . on May 16, 1961, National Screen terminated its policy of furnishing the local poster renters with advertising accessories . . . . It has persisted to the present in this refusal to sell the local poster renters, including the plaintiff, advertising materials.' (See pages 6-7 of Plaintiff's Supplemental Brief).

"It is submitted that that statement of fact is obviously and completely irreconcilable with the judgment entered by Judge Henderson in this case.

Conclusion

"It is therefore submitted that a rehearing in the case should be granted in order to afford the plaintiff an oppor-

tunity to be heard in oral argument.

"Respectfully submitted,"

The action taken by the court below on this petition was to dismiss it without comment (see Appendix E, infra. p. A-16).

ARGUMENT

It is indeed a fact that the judgment entered by the court below confers on a convicted monopolist (National Screen Service Corporation) a certain immunity from liability for future violations of the antitrust laws.

For proof that National Screen is a convicted monopolist, see the opinion in *Poster Exchange, Inc., vs. National Screen Corp.*, 431 F.2d 534 (5th Cir. 1970), *supra*.

That case is a forerunner of this case.

In other words, the conduct complained of in that case is the same as the conduct involved in this case. It is not even contended that there has been any change in the monopolist's conduct.

Therefore it follows that the decision below does give the monopolist an immunity from liability for future violations.

It is submitted that instead of summary dismissal this case should be placed on the list for trial.

CONCLUSION

For the foregoing reasons the prayer of this petition for issuance of a writ of certiorari should be granted.

Respectfully submitted,

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OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari have been served on Tench C. Coxe, 1400 Candler Building, Atlanta, Georgia 30303, Walter S. Beck, 40 West 57th Street, New York, New York 10019, and Charles H. Kirbo, 2500 Trust Company Tower, Atlanta, Georgia 30303, on this 11th day of March, 1977.

C. ELLIS HENICAN, JR.

APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

The POSTER EXCHANGE, INC.,
Plaintiff-Appellant
v.
NATIONAL SCREEN SERVICE CORPORATION
et al.,
Defendants-Appellees.

No. 76-1870
Summary Calendar.*
United States Court of Appeals, Fifth Circuit.
Nov. 11, 1976

In an action for treble damages for alleged monopolization of the motion pictures accessories market, and after remand, 517 F.2d 117, 517 F.2d 129, summary judgment was granted against the plaintiff by the United States District Court for the Northern District of Georgia at Atlanta, Albert J. Henderson, Jr., J., and plaintiff appealed. The Court of Appeals held that plaintiff's affidavits lacked requisite evidentiary value to demonstrate a triable issue of fact as to the occurrence of any specific act or word denying plaintiff access to supplies of motion picture posters and accessories.

Affirmed.

* Rule 18, 5 Cir.: *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part 1.

Federal Civil Procedure 2539

Where plaintiff's affidavits opposing grant of summary judgment in antitrust suit lacked requisite evidentiary value to demonstrate triable issue of fact as to occurrence of any specific act or word denying plaintiff access to supplies of motion picture posters and accessories, summary judgment was properly granted against plaintiff. Fed Rules Civ. Proc. rule 56(e), 28 U.S.C.A.

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Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, and GEWIN and MORGAN, Circuit Judges

PER CURIAM:

Having expressed the hope that this seemingly endless litigation would terminate at Poster VII,[1] the litigants have

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1. In *Poster Exchange, Inc. v. National Screen Service Corporation,* 5 Cir. 1972, 456 F.2d 662, the following Poster history was presented

Poster 1: National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir, 1962, 305 F.2d 647, in which this Court in an opinion written by Judge Gewin affirmed the District Court's denial of National Screen's motion for summary judgment and Poster Exchange's motion for preliminary injunction and said there were issues of fact to be resolved;
Poster II: Poster Exchange, Inc. v. Paramount Film Dist. Corp., 5 Cir., 1965, 340 F.2d 320, in which this Court affirmed the District Court's summary judgment in favor of the film producing companies;

(Footnote 1 continued on next page)

already managed to continue this lawyer-court litany through Poster X.[2] In Poster IX and X, we remanded to the District Court for proceedings directed toward a unitary

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(Footnote 1 - continued from previous page)

Poster III: Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir. 1966, 362 F.2d 571, in which this Court in an opinion by Judge Tuttle reversed the District Court's summary judgment in favor of National Screen;
Poster IV: Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1970, 421 F.2d 1313, rehearing denied, 427 F.2d 710, cert. denied, 1971 400 U.S. 991, 91 S.Ct. 454, 27 L.Ed. 2d 439, in which this Court reversed in part summary judgment for Producers and National in the New Orleans litigation; and
Poster V: Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1970, 431 F.2d 334, cert. denied, 1971, 401 U.S. 912, 91 S.Ct. 880, 27 L.Ed. 2d 811, in which this Court affirmed (save for attorney's fees) the District Court's award of triple damages against National upon trial on the merits of suit No. 7665 after remand of Poster III.

2. Poster VI: Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1971, 441 F.2d 560.

Poster VII: Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1972, 456 F.2d 662.

Poster VIII: Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1975, 517 F.2d 110.

Poster IX: Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1975, 517 F.2d 117.

Poster X: Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1975, 517 F.2d 129.

issue. To avoid summary judgment, Poster was to present legally probative evidence which would demonstrate that a triable issue of fact exists as to the occurrence of any specific act or word denying it access to supplies of motion picture posters and accessories.

As before, Poster's response was to present affidavits lacking the requisite evidentiary value. *See Benton-Volve-Metairie, Inc. v. Volvo Southwest, Inc.*, 5 Cir., 1973, 479 F.2d 135, 139; *Bruce Construction Corp. v. United States*, 5 Cir., 1957, 242 F.2d 873, 875; F.R. Civ. P. 56(e). Consequently, we find no basis for error in the District Court's granting summary judgment against Poster. Hopefully, Poster XI is the last Poster to come before this Court from this struggle.

AFFIRMED.

A True copy
Edward W. Wadsworth
Clerk, U.S. Court of Appeals, Fifth Circuit

By: s/ Mary Beth Breaux
Deputy
New Orleans, Louisiana Dec. 21, 1976

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

Filed: Dec 23, 1976

No. 76-1870
Summary Calendar

D.C. Docket No. CA 12497

THE POSTER EXCHANGE, INC.,
Plaintiff-Appellant

versus

NATIONAL SCREEN SERVICE CORPORATION
ET AL.,
Defendants-Appellees

Appeal from the United Staes District court for the
Northern District of Georgia

Before BROWN, Chief Judge, and GEWIN and
MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the North-

ern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

November 11, 1976

Issued as Mandate: Dec 21, 1976

A true copy
Test: Edward W. Wadsworth
Clerk, U.S. Court of Appeals, Fifth Circuit

By: s/ Mary Beth Breaux
Deputy

New Orleans, Louisiana Dec 21, 1976

APPENDIX C

ORDER OF UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Filed: March 3, 1976

THE POSTER EXCHANGE, INC.
versus CIVIL ACTION NO. 12497
NATIONAL SCREEN SERVICE
CORPORATION

ORDER

On December 5, 1975 the plaintiff was directed to file within twenty days thereof a statement identifying "those specific acts or words which amount to a refusal to deal [by National Screen] during the period sued upon." (1965-1969). This additional inquiry was made in light of the opinions of the Fifth Circuit Court of Appeals in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 and 517 F.2d 129.

On December 22, 1975, the plaintiff filed a "Statement Sur Order of December 5, 1975" setting forth the history of the controversy but failing to specify the particular instances where it was denied access to posters for distribution. In its response filed on January 7, 1976, the defendant emphasized this noncompliance with the order of December 5, 1975.

Subsequently, on January 15, after the expiration of the

twenty-day period, the plaintiff submitted the affidavit of William Cobb, its general manager, in which he once more detailed the background of the dispute and added, at the end, two paragraphs, as follows:

> 22. During the period of May 16, 1961 to October 29, 1970 and particularly during the years 1965 to 1969, plaintiff's employee and agent repeatedly requested National Screen's employees and agents to sell plaintiff supplies of standard accessories, but National Screen's employees and agents refused and denied all of such requests.
>
> 23. During the years 1965 through 1969 National Screen's employees and agents, who were in charge of National Screen's branch office in the City of Atlanta, Ga. were under instructions from National Screen's general manager not to sell any supplies of standard accessories to plaintiff.

As the defendant points out, the allegations of these paragraphs have never before been asserted by the plaintiff. Most importantly they are simply generalizations which do not satisfy the directives of the court of appeals and this court requiring identification of the acts or words from 1965 to 1969 which constituted a refusal to deal. Moreover, Paragraphs 22 and 23 are mere conclusions of the affiant without any supporting facts to demonstrate a triable issue. Consequently, such an affidavit has no probative value, *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135, 139 (5th Cir. 1973).

Neither does the previous record reveal any question of

fact respecting the alleged refusal to deal between 1965 and 1969. The Order of Reference to the Special Master, dated September 28, 1972, directed that the master require the plaintiff to show what acts after 1961 constituted violations of the antitrust laws. The plaintiff responded by reciting the conduct of the defendants through 1961. In the Report of the Special Master dated July 30, 1973, the master specifically found that "[p]laintiff has been unable to demonstrate what post-1961 acts substantively constitute antitrust violations on theory declared in Poster IV." (Finding of Fact No. 20, p. 13). The entire Report of the Special Master was approved and incorporated by reference in the order of this court of December 12, 1973. This particular finding was reiterated in the order of April 15, 1974 granting summary judgment for National Screen.

Therefore, upon review of the record and after additional inquiry it is apparent that the plaintiff has not specified any act or word between 1965 and 1969 which would amount to a refusal to deal by National Screen. Thus, the plaintiff has not presented "a triable issue of fact as to the occurrence of any specific act or word denying to it of access to Columbia's posters for distribution during the statutory period," 517 F.2d at 129 or "a triable case of fact as to the occurrence of any specific act or word denying it of access to the Producer's posters for distribution during the statutory period. . ." 517 F.2d at 132.

Let judgment be entered accordingly in favor of the defendants, Columbia Pictures Corporation[1] and National Screen Service Corp.

---

1. The summary judgment in favor of the other defendant producers was affirmed by the Fifth Circuit in Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117.

So ordered this the 3 day of March, 1976.

s/ Albert J. Henderson, Jr.
Judge, United States District
Court for the Northern Dis-
trict of Georgia

APPENDIX D

PETITION FOR REHEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed: Nov 23, 1976

NO. 76-1870

THE POSTER EXCHANGE, INC.,
Plaintiff-Appellant

versus

NATIONAL SCREEN SERVICE CORPORATION,
ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Georgia

PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

It is respectfully submitted that in view of all the facts and circumstances the plaintiff should be permitted to present oral argument in this case.

Up to this time neither the court below nor this Court has heard any oral argument.

The question presented is whether plaintiff has any substantial proof that National Screen Service Corporation

("National Screen") refused to sell supplies of advertising accessories to plaintiff during the years 1965-1969.

Plaintiff respectfully submits that the three points contained in plaintiff's supplemental brief are of sufficient substance to entitle the plaintiff to be heard in oral argument.

These three points may be briefly summarized as follows:

I

In the Complaint filed in this case (on February 26, 1969) plaintiff alleged (¶23(c)) as follows:

> "(c) Since May 16, 1961, National Screen Service Corporation has refused absolutely to deal with plaintiff in either standard or specialty accessories."

And National Screen's answer (see ¶8) constitutes a legal admission that this allegation is true and correct (see page 3 of Plaintiff's Supplemental Brief).

It should also be noted that the facts stated in Plaintiff's Supplemental Brief have not been challenged in any way.

II

At a hearing before Judge Morgan, on November 23, 1971, Mr. Charles H. Kirbo, attorney for National Screen, in open court, made a rather extensive chronological state-

ment (see pages 3-6 of Plaintiff's Supplemental Brief) at the end of which he said:

> "Mr. Kirbo: At that time we were actually refusing to sell them. Since then . . . we offered to sell them and they agreed to buy . . . and are still buying from us."

When Mr. Kirbo's full statement is taken into consideration, it becomes plain that what he meant to say was that the period of time when National Screen was "refusing to sell" included part of the years 1965 to 1969.

Neither Mr. Kirbo nor National Screen has denied this.

III

In an opinion filed on April 15, 1974, the court below (per Hon. Albert J. Henderson, Jr.) in part said:

> ". . .on May 16, 1961, National Screen terminated its policy of furnishing the local poster renters with advertising accessories . . . . It has persisted to the present in this refusal to sell the local poster renters, including the plaintiff, advertising materials." (See pages 6-7 of Plaintiff's Supplemental Brief).

It is submitted that that statement of fact is obviously and completely irreconcilable with the judgment entered by Judge Henderson in this case.

Conclusion

It is therefore submitted that a rehearing in the case should be granted in order to afford the plaintiff an opportunity to be heard in oral argument.

Respectfully submitted,

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s/ C. Ellis Henican, Jr.
C. ELLIS HENICAN, JR.

OF COUNSEL:

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Suite 4440, One Shell Square
New Orleans, Louisiana 70139
Telephone: 581-7575
ATTORNEYS FOR PLAINTIFF-APPELLANT

CERTIFICATE

I, one of the attorneys for Plaintiff-Appellant, hereby certify that copies of the above and foregoing Petition for Rehearing have been forwarded to opposing counsel by depositing said copies in the U.S. Mail with proper postage

affixed, on this 23rd day of November, 1976.

s/ C. Ellis Henican, Jr.
C. ELLIS HENICAN, JR.

APPENDIX E

ON PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-1870

THE POSTER EXCHANGE, INC.,
Plaintiff-Appellant

versus

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,
Plaintiffs-Appellees

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING

(DECEMBER 13, 1976)

Before BROWN, Chief Judge, and GEWIN and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
s/ John R. Brown
CHIEF JUDGE

APPENDIX F

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. Sections 1 and 2;

Section 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with Foreign nations, is declared to be illegal. . .Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sections 4 and 16 of the Clayton Act, 28 Stat. 731 and 737, 15 U.S.C. Sections 15 and 26.

Section 4.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16.

Any person, firm, corporation, or assiciation shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1268

THE POSTER EXCHANGE, INC.,
Petitioner,

vs.

NATIONAL SCREEN SERVICE CORPORATION AND COLUMBIA PICTURES CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL SCREEN SERVICE CORPORATION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1268

THE POSTER EXCHANGE, INC.,
Petitioner,

vs.

NATIONAL SCREEN SERVICE CORPORATION AND COLUMBIA PICTURES CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the concurrent judicial factual findings and determinations by both the District Court and the Court of Appeals—that Petitioner's affidavits submitted in *opposition* to Respondent's motion for summary judgment in two remand proceedings* directed by the Court of Appeals, lacked the requisite evidentiary value demonstrating a triable issue of fact as to the occurrence, during the four (4) years statutory period in suit, of an injurious act or word of refusal by National Screen precluding Petitioner's obtaining standard accessories from Respondent,

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*542 F.2d 255 (1976); 517 F.2d 129 (1975).

or which interfered with Petitioner's access to the motion picture producers' standard accessories, and that a summary judgment dismissal against Petitioner was proper and justified—should be reviewed by this Honorable Court for irrelevant reasons never presented in the Courts below, except in Petitioner's motion in the Court of Appeals for a rehearing made after the Court of Appeals had for the second time determined that:

> "As before, Poster's response was to present affidavits lacking the requisite evidentiary value. (F.R.C.P. 56e and cases cited). Consequently, we find no basis for error in the District Court's granting summary judgment against Poster." (542 F.2d at 257).

STATEMENT OF THE CASE

The historical background of the series of protracted litigations between the parties herein, and Petitioner's New Orleans affiliate and this Respondent, being well known to this Honorable Court, we shall refrain from burdening this Court with any statement reviewing it.

In its "Statement of the Case," Petitioner incorrectly states that in this instant action—which is the Poster No. "2" action, Petitioner seeks damages and injunctive relief to compel Respondent to sell its copyrighted standard advertising accessories to Petitioner. The fact is that Petitioner's complaint does not request injunctive relief. Significantly, when Petitioner was awarded a judgment in Poster No. "1" (7665), Petitioner's proposed judgment neither requested nor included an injunction.

Moreover, the following sworn statements in Petitioner President Cobb's affidavit sworn to February 20,

1974, submitted by Petitioner in the instant case in *opposition* to Respondent's motion for summary judgment—are conclusive contradictions of Petitioner's representation to this Court that it is suing to compel Respondent to sell its advertising accessories to Petitioner, and to recover damages for Respondent's refusal to sell its standard accessories which Petitioner sought to purchase from Respondent:

> "20. Consequently, when plaintiff speaks of a 'continuing conspiracy' plaintiff means not a conspiracy to continue the 1961 refusal to deal, but a conspiracy to continue implementing the illegal exclusive license agreements of the 1940's, which—plaintiff contends—are still in full force and effect, notwithstanding the fact that they have been replaced by allegedly 'non-exclusive' agreements."
>
> "21. Similarly, when plaintiff speaks of suffering continuing losses *plaintiff means not losses flowing from the refusal to deal*, but losses resulting from the exclusive license agreements." (Emphasis added)
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> • • •
>
> "25. The illegal overt acts committed by defendants from February 26, 1965 to February 26, 1969, were (i) acts of the defendant's film companies giving to National Screen, from day to day, exclusive rights of control over, and possession of, all posters produced, and (ii) the acts of National Screen in making periodic payments to the film companies of a substantial share of its profits."
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> • • •
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> "27. On October 29, 1970, National Screen, *without any request from Plaintiff*, offered to and did resume dealing with Plaintiff. . . ." (Emphasis added)

In addition, in paragraph "31" of President Cobb's affidavit sworn to December 11, 1973, submitted by him in behalf of his wholly-owned New Orleans affiliate "Exhibitors Poster Exchange," in opposition to Respondent's motion for summary judgment in the similar action brought against Respondent and the same motion picture producer defendants, Petitioner's President Cobb said:

> "Plaintiff *has no desire to deal with National Screen* or with any other competitor and *plaintiff's claim is not based on National's 1961 refusal to continue to deal with plaintiff.*" (Emphasis added)

Again, in November, 1971, approximately two years after the entry of the final judgment in Poster No. "1", and during the pendency of the instant Poster No. "2" action, Petitioner moved in Poster No. "1" to amend the judgment by the addition of an injunctive provision which, as previously stated, had not been requested in its proposed judgment entered in 1969. However, the following colloquy between Petitioner's attorney, Mr. Hester, and Circuit Judge Morgan, who as District Judge had tried Poster No. "1", further confirms that Petitioner had not sought to deal with this Respondent during the period in suit and been refused—and therefore, was not seeking to compel Respondent to deal with Petitioner, but that Petitioner was asking the Court to permanently enjoin Respondent from doing business, so that Petitioner would have no competition:

> "The Court: And then you say now they are not selling to you?
>
> "Mr. Hester: No. We are not saying that—we want them out of business. . . . We want a permanent injunction to give us a chance to recapture our customers." (p. 17 lines 22 through 25 and p. 18 lines 1 and 2 of transcript of hearing before Hon. Lewis R. Morgan, U.S. Circuit Judge, in Atlanta on Nov. 23, 1971)

ARGUMENT

Petitioner's attempt at pages "2" through "5" of the Petition to analogize the facts and legal issues in the instant case with those presented in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955), and in Poster No. "1," is so patently frivolous, that we shall not burden this Court with any discussion of the utter groundlessness of the contention.

Having been afforded two opportunities by the Court of Appeals' two remands to present evidentiary material that there is a triable issue of fact as to the occurrence of any specific act or word on the part of Respondent during the period in suit, which denied Petitioner access to the motion picture producers' posters, or by refusal, precluded Petitioner obtaining supplies from Respondent—and having failed on both occasions to demonstrate that a triable issue exists as to whether it has actually been refused by Respondent—the Court of Appeals concurred with the District Court that Petitioner had failed to demonstrate that there was any triable issue and that the summary judgment dismissal was justified.

Respondent respectfully submits that Petitioner's belated hearsay and conclusory generalizations were justifiably rejected as a matter of law—particularly since Petitioner's President Cobb's sworn statements in the affidavits submitted in *opposition* to Respondent's motion for summary judgment, conclusively contradicted Peti-

tioner's last-minute contention that Petitioner had requested and that Respondent had refused to deal with Petitioner—born when it realized that the Court would not enjoin Respondent from continuing in business in competition with Petitioner.

CONCLUSION

Respondent respectfully submits that in keeping with the traditional principles long applied by this Honorable Court, that contentions not submitted to and therefore not appraised by the Courts below, will not be considered by this Court: *Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415, 418 (1932); and that concurrent findings of fact of the two courts below are not shown to be plainly erroneous, are accepted by this Court as the conclusive basis for decision, *Virginian Railway Company* v. *System Federation No. 40, Railway Employees Dep't of the A. F. of L. etc., et al.*, 300 U.S. 515, 542 (1937), and the cases cited by Mr. Justice Stone, Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of National Screen Service Corporation in Opposition to Petitioner's Petition for a Writ of Certiorari by depositing a copy of the same in the United States Mail with sufficient postage affixed thereto to insure delivery addressed to C. Ellis Henican, Jr., Esq., Henican, James & Cleveland, Suite 4440, One Shell Square, New Orleans, Louisiana 70139, counsel for petitioner; and Tench C. Coxe, Esq., Troutman, Sanders, Lockerman & Ashmore, 1400 Candler Building, Atlanta, Georgia 30303, counsel for Columbia Pictures Corp.

This 8th day of April, 1977.

JOHN IZARD